IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR KING COUNTY

THE BASEBALL CLUB OF SEATTLE, L.P.; WASHINGTON STATE MAJOR LEAGUE BASEBALL STADIUM PUBLIC FACILITIES DISTRICT, Plaintiffs, vs. CITY OF SEATTLE; DAVID HASSON; DAVID HASSON ARCHITECTS; MICHAEL RAMAGE; ROHA, LLC, Defendant.	No. 08-2-43540-7 SEA MEMORANDUM OPINION RE LAND USE PETITION ACT (LUPA)

This case comes before the Court for determination on the Land Use Petition Appeal ("LUPA") by Petitioners Baseball Club of Seattle ("Mariners") and Washington State Major League Baseball Stadium Public Facilities District ("PFD") of a decision by the City of Seattle to issue a land use permit for an adult cabaret located at 1530 First Avenue South. The matter involves the interpretation and application of a Seattle City Ordinance requiring adult cabarets to be located "eight hundred (800) feet or more from any lot line of property containing any community center; child care center; school, elementary or secondary; or public parks and open space use." Seattle Municipal Code ("SMC") 23.50.012E.

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(206) 296-9345

FACTS

For approximately fifteen years, the City of Seattle had banned the opening of new adult cabarets within the city. After the ban was found unconstitutional by the federal court in *ASF, Inc. v. City of Seattle*, 408 F. Supp. 2d 1102 (W.D. Wash. 2005), the City dealt with new requests to open adult cabarets by passing an ordinance requiring an 800 feet buffer between adult cabarets and "any community center; child care center; school, elementary or secondary; or public parks and open space use."

Respondent ROHA LLC submitted an application to establish an adult cabaret at 1530 First Avenue South. Four properties in contention are located within 800 feet of the proposed location of the adult cabaret: 1) Safeco Field, 2) the plaza on the east of Occidental Avenue South and west of the ballpark parking garage ("Safeco Plaza"), 3) the plaza to be constructed at First Avenue South and Edgar Martinez Drive ("Edgar Martinez Plaza"), and 4) the Mountains to Sound Greenway that runs along Edgar Martinez Drive and South Atlantic Street ("Greenway").

Respondent ROHA's application is the very first adult cabaret permit to be reviewed under this ordinance. After reviewing respondent's application, the Department of Planning and Development ("DPD") prepared a formal Land Use Code interpretation, addressing the issues raised by the dispersion requirements in the ordinance. In reaching its decision, DPD considered the following evidence – maps of the properties around the proposed location of the adult cabaret, aerial photographs, assessor's records, dispersion site plans and declarations submitted by respondent's attorney, and a survey conducted by City's interns. DPD concluded that all four of the locations at issue were not "public parks and open space uses" and found the establishment of an adult cabaret at 1530 First Avenue South to be consistent with the dispersion requirements

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of SMC 23.50.012E. Thus, DPD granted respondent's land use permit request.

Petitioners Mariners and PFD argue that the proposed location for the adult cabaret falls within 800 feet of "public parks and open space use" for purposes of the dispersion ordinance. On those grounds, pursuant to the provisions of the State's LUPA provisions, RCW 36.70C.130, they appeal DPD's issuance of a land use permit to ROHA allowing an adult cabaret to open at 1530 First Avenue South.

This Court concludes that DPD did not clearly err with respect to the characterization of these properties and affirms DPD's land use decision.

STANDARD OF REVIEW

A party seeking relief under LUPA has the burden of establishing one of the following statutory standards:

> (a) The body or officer that made the land use decision engaged in unlawful procedure or failed to follow a prescribed process, unless the error was harmless;
> (b) The land use decision is an erroneous interpretation of the law, after allowing for such deference as is due the construction of a law by a local jurisdiction with expertise;
> (c) The land use decision is not supported by evidence that is substantial when viewed in light of the whole record before the court;
> (d) The land use decision is a clearly erroneous application of the law to the facts;
> (e) The land use decision is outside the authority or jurisdiction of the body or officer making the decision; or
> (f) The land use decision violates the constitutional rights of the party seeking relief.

RCW 36.70C.130. Petitioners assert errors by DPD as to subsections (b) and (c). Respondents claim that subsection (d), the clearly erroneous standard, governs.

Challenges under subsection (b) claiming an erroneous interpretation of the law present legal questions that are reviewed *de novo*. *HJS Dev., Inc. v. Pierce County,* 148 Wash.2d 451, 468, 61 P.3d 1141 (2003). Under subsection (c), this Court looks for

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substantial evidence supporting the land use decision. Substantial evidence is evidence that would persuade a reasonable person of the truth of the statement asserted. *Freeburg v. City of Seattle,* 71 Wash. App. 367, 371, 859 P.2d 610 (1993). The evidence and all reasonable inferences are considered in the light most favorable to the party who prevailed in the highest forum that exercised fact-finding authority, *Freeburg,* 71 Wash. App. at 371-72, 859 P.2d 610, here DPD.

Subsection (d) involves applying the law to the facts. Under the clearly erroneous standard of subsection (d), the evidence and reasonable inferences are viewed in light most favorable to the party that prevailed in the highest forum exercising fact-finding authority. *Citizens to Preserve Pioneer Park, L.L.C. v. The City of Mercer Island,* 106 Wash. App. 461, 473-74, 24 P.3d 1079 (2001). The applicable test under this standard requires this Court to determine whether it is left with a "definite and firm conviction that a mistake has been committed." *Citizens to Preserve,* 106 Wash.App. at 473, 24 P.3d 1079.

ANALYSIS

I. Statutory Interpretation

In interpreting an ordinance, this Court must begin with the plain language. *Sleasman v. City of Lacey*, 159 Wash.2d 639, 643 (2007). If the plain language of the ordinance is unambiguous, the analysis ends there. If an ordinance can be interpreted in two reasonably different ways, then the court should give effect to the legislative intent. *Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wash.2d 1, 12 (2003). The fact that the ordinance does not define certain words or phrases does not make it ambiguous. *Cowiche Canyon Conservancy v. Bosley*, 118 Wash.2d 801, 814 (1992).

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Although the Code does not define "public parks and open space use," "parks and open space" is defined at SMC 23.84A.030 as "a use in which an area is permanently dedicated to recreational, aesthetic, educational or cultural use and generally is characterized by its natural and landscape features. A parks and open space use may be used for both passive and active forms of recreation." A common word such as "public" should be given its ordinary, dictionary meaning. *See Peter Schroeder Architects v. City of Bellevue*, 83 Wash. App. 188, 192, 920 P.2d 1216, 1217 (1996) ("We give undefined terms their plain and ordinary meaning, which may be found in dictionary definitions.") Black's Law Dictionary (7th ed.) defines "public" as "relating or belonging to an entire community, state, or nation; open or available for all to use, share, or enjoy." "Use" is also defined in the Code; it means "the purpose for which land or a structure is designed, built, arranged, intended, occupied, maintained, let or leased." SMC 23.84A.040.

Petitioners propose that this Court interpret the ordinance as prohibiting adult cabarets from locating within 800 feet of places "where children tend to congregate." The City Council, however, did not adopt such broad language in the ordinance. If it had intended to require dispersion from all places where children tend to congregate, it would have specifically included that language. This Court refuses to read words into the ordinance which do not exist in the plain language.

II. DPD did not clearly err in applying the definition of "public parks and open space use" to Safeco Field, Safeco Plaza, the Greenway, or Edgar Martinez Plaza.

Under the correct standard of review, RCW 36.70C.130(d), petitioners have failed to meet their burden of showing that DPD clearly erred in concluding that Safeco Field, Safeco Plaza, the Greenway, or Edgar Martinez Plaza are not "public parks and open space use." This Court is not left with a definite and firm conviction that DPD erred in applying the statutory definition of "public parks and open space use".

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a. Safeco Field

A public entity, PFD, owns Safeco Field, although Mariners are the long-term lessee of Safeco Field. Mariners operate Safeco Field and host baseball games as well as a variety of public events at this site. Thousands of children attend these events at Safeco Field every year. The permitted use of Safeco Field is as a "spectator sports facility," defined as "a theater and spectator sports facility intended and expressly designed for the presentation of sports events, such as a stadium or arena." SMC 23.84A.010.

There is evidence that the City Council considered, but ultimately rejected, adding "spectator sports facility" to the list of places from which dispersion would be required under the ordinance. When the City Council was considering enacting this ordinance, Mariners wrote a letter asking the Council to include "spectator sports facilities" in the Code. The Council rejected Mariners' suggestion. "Spectator sports facilities" is a separate category of land use that the Council considered, but decided against including in this provision of the Code.

Petitioners are correct in stating that the City Council intended to keep adult cabarets dispersed from "places where children congregate." But that does not mean that dispersion is required from all places where children do and might congregate. The Council specifically listed certain places that require the 800 feet buffer. Applying the statutory canon of *expressio unius est exclusio alterius*, the enumerated list should not be interpreted to include the places it does not mention. The Code does not include many other places where children usually congregate, such as libraries, swimming pools, churches, and malls, which do not fall in the four categories mentioned in the Code. In this instance, the City Council considered – and expressly rejected - inclusion of the separately designated category of "spectator sports facility." This type of designation is not listed in the ordinance as requiring the application of the setback provision,

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and, therefore, DPD was correct in its interpretation of excluding Safeco Field from consideration in the dispersion requirement.

Petitioners have failed to meet their burden of showing that DPD clearly erred in finding that Safeco Field does not qualify as a "public parks and open space use" from which dispersion would be required.

b. Safeco Plaza

DPD did not clearly err in concluding that Safeco Plaza is not a "public park and open space use." In its conclusion, DPD stated that "it is not uncommon for publicly accessible open plazas, large or small, to be provided in conjunction with office buildings, institutions or other large developments where people congregate." DPD noted that these open plazas may qualify as "open space" uses, but are not "parks and open space uses" within the meaning of the code.

Petitioners argue that in reaching this conclusion, DPD ignored the substantial weight of evidence establishing Safeco Plaza's public ownership and similar natural and landscape features as other city parks. Although leased to the Mariners, Safeco Plaza is owned by PFD, a public entity. Furthermore, "generally" as used in the phrase "generally characterized by natural and landscape features" means "usually; in most instances." Webster's New World Collegiate Dictionary, p.591 (4th Ed. 2004). Parks *usually* have natural and landscape features, but they do not *always* have those features. By way of example, Westlake Park is designated by the City as a "park," although it is not characterized by its natural and landscape features. Numerous other parks also listed by the City of Seattle on its official list of City-owned public parks contain similar features as Westlake Park, i.e., a lack of "natural and landscape features", for example Tillicum Park, Union Station Plaza, and McGraw Park. The City failed to show any discernible distinction among Westlake Park, Tillicum Park, Union Station Plaza, and Safeco Plaza in terms

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of its "natural and landscape features." In fact, at oral argument the City conceded that Safeco Plaza is indistinguishable from Westlake Park with respect to its features and characteristics. Acknowledging this lack of distinction, the City then argued that Westlake Park (and those other parks with similar characteristics) did not meet the ordinance definition of "park and open space." This conclusion is untenable – the ordinance does not require that such locations *always* be "characterized by natural and landscape features." Rather, the ordinance specifies that parks and open spaces are *generally* characterized by such features. As indicated above, generally, means usually – but not always. Although many City parks are clearly characterized by such features, e.g., Discovery Park, Woodland Park, Volunteer Park, City Hall Park, many other City parks are not, e.g. Westlake Park, Tillicum Park, Union Station Plaza, and PDA-owned Safeco Plaza.

Nonetheless, as correctly noted by respondent ROHA, Safeco Plaza does have distinguishing characteristics, which, in this Court's view, are dispositive. Specifically, in contrast to the other parks and open spaces identified by petitioners, Safeco Plaza has curb cuts, routinely is used for parking buses, and operates as an overflow parking area. Part of the Plaza is used as a garage, which is also documented in the assessor's records. "Use" is a defined term in the Code— it "means the purpose for which land or a structure is designed, built, arranged, intended, occupied, maintained, let or leased." SMC 23.84A.040. The record before DPD reflects that Safeco Plaza was "designed" and "intended" to be a public plaza. The Master Use Permit for Safeco Field ballpark and garage depicts Safeco Plaza as a "public activity plaza." Furthermore, DPD itself has previously documented Safeco Plaza as a "public plaza." In its Final Environmental Impact Statement for Livable South Downtown Planning, DPD listed

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Safeco Plaza under "neighborhood parks, open space, recreational features and public-private open spaces."

"Public plaza" is not defined. It may be - or may not be – synonymous with "public parks and open space uses." Dedication as a public plaza may not the same as permanent dedication for "public parks and open space uses." Accordingly, this Court must consider the actual use of the public plaza space, specifically whether the public plaza is "permanently dedicated to recreational, aesthetic, educational or cultural use." What distinguishes Safeco Plaza from the other "public parks and open spaces" identified by petitioners is that the plaza is not permanently dedicated to "recreational, aesthetic, educational or cultural use." Rather, Safeco Plaza serves the similar function as a multiplicity of plazas throughout this city – as an adjunct to office buildings, institutions or other large developments where people congregate. Most significantly, here, Safeco Plaza operates as an overflow parking area, essentially auxiliary to the adjacent parking garage. Such a use for parking and traffic is inconsistent with park uses for recreational and aesthetic purposes. This Court recognizes that many parks and open spaces have parking areas and traffic passing through a park. However, in this instance, there is no distinction between what may be designated as "park area" and what is in actuality used for overflow parking and as a parking lot. This Court is not left with "definite and firm conviction that a mistake has been committed" by DPD in concluding that Safeco Plaza does not constitute "public parks and open space use." *See Citizens to Preserve,* 106 Wash.App. at 473, 24 P.3d 1079.

c. Edgar Martinez Plaza

Prior to 2001, Edgar Martinez Plaza was a publicly-owned open space. Now owned by the Mariners, this space is currently undeveloped. As part of the sale agreement, PFD executed a

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covenant with the Mariners to ensure that the preservation and development of the plaza remains compatible with Safeco Field. The covenant also noted that PFD may not unreasonably withhold approval if the Mariners develop the plaza in a manner inconsistent with the Preliminary Development Plan. The Preliminary Development Plan calls only for a "mixed use building" to be developed at this site.

Edgar Martinez Plaza fails to meet the definition of "public parks and open space use." First, the plaza is not publicly owned. It is owned by a for-profit entity, the Mariners. Second, the plaza has not been "*permanently* dedicated to recreational, aesthetic, educational or cultural use." PFD's covenant with the Mariners does not create an obligation on the Mariners to permanently dedicate the plaza to recreational use. Mariners can change the use of the plaza at any time; PFD's right to review and approve future development is not sufficient to ensure that the plaza would be permanently dedicated to recreational, aesthetic, educational or cultural use.

d. The Greenway

Managed by the Mountains to Sound Greenway Trust, a non-profit corporation, the Greenway forms a scenic corridor linking the Cascade Mountains to the Puget Sound basin. DPD concluded that the Greenway is not a "public parks and open space use" because it did not find any record of a public park use established by permit for the Mountains to Sounds Greenway. It is important to point out that the ordinance does not require the setback to be applied only from *permitted* public parks and open space use, but rather from "*any* … public parks and open space use." (emphasis added). Thus, the fact that there is no permit establishing a public park at the Greenway is not fatal to finding that the Greenway nonetheless qualifies as a "public parks and open space use." Respondent ROHA has conceded that the Greenway is public property. TheGreenway has received a $2 million improvement package from City Parks Department and

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there are plans to connect the Greenway to the city trails network.

The ontological question in this instance is whether a sidewalk changes its character from sidewalk to "public parks and open space use" when and if the Trail connects to the sidewalk next to Safeco Field. This Court concludes that DPD did not commit clear error in determining that the south sidewalk along Edgar Martinez Drive does not constitute "public parks and open space use, " and will not in the future, notwithstanding any connection to the Mountains to Sound Greenway. The fact that the sidewalk south of Safeco Field may become part of an overall park system does not change its character from sidewalk to "public parks and open space use." Its character remains the same, as does its function. There was no evidence in the record to the contrary. Accordingly, DPD did not clearly err in concluding that the south sidewalk along Edgar Martinez Way does not constitute "public parks and open space use" regardless of whether ultimately the sidewalk becomes connected to the Mountains to Sound Greenway.

CONCLUSION

For the foregoing reasons, this Court concludes that DPD did not clearly err in applying the definition of "public parks and open space use" to Safeco Field, Safeco Plaza, the Greenway, or Edgar Martinez Plaza, and the land use decision of the City of Seattle Department of Planning and Development ("DPD") with respect to issuance of a permit for 1530 First Avenue South is AFFIRMED.

Dated this 26th day of June, 2009.

/s/ John P. Erlick
Judge John P. Erlick

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516 Third Avenue
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(206) 296-9345